to the consent judgment nor an alter ego to Samsung, and had not incurred the fees in defending against a contract claim.

IXYS appealed, and the Federal Circuit reversed, applying California statutory and decisional law. California Civil Code § 1717 states, in pertinent part:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

The California Supreme Court has held that § 1717 must be interpreted "to further provide a reciprocal remedy for a *nonsignatory* defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contract against the defendant." *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 158 Cal. Rptr. 1 (1979) (emphasis added). In so holding, the Court cited *Babcock v. Omansky*, 31 Cal. App.3d 625, 633-34 (1973), where attorney fees were awarded pursuant to § 1717 to a nonsignatory defendant who the plaintiff had alleged was liable as a coventurer or partner with another defendant who had executed a promissory note providing for attorney fees. The court in *Babcock* reasoned that the language of the statute was sufficiently broad to include persons who had not signed the contract but were sued on the note and found not to be parties to it.

The Federal Circuit, while noting that lower appellate courts in California had criticized *Babcock*, correctly relied upon *Reynolds* and other overriding decisions of the California Supreme Court:

> A more recent decision of the California Supreme Court has provided an even broader formulation. In *Santisas v. Goodin*, 951 P.2d 399, 406-407 (Cal. 1998), the California Supreme Court noted that section 1717 applies in two situations. The first situation is when a contract provides a right to attorney fees to one party but not the other. The second situation described by the court "is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract." *Id.* at 406 (quotation marks and citation omitted). The court explained, "If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral—regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing party—because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the

> contract had they prevailed." *Id.* at 406-407. We conclude based on these decisions of the California Supreme Court that if IR would have been entitled to attorney fees against IXYS if it prevailed, IXYS is entitled to claim attorney fees against IR based on the agreement. Because IR sued IXYS for a violation of the injunction contained within the consent judgment as if IXYS were a party to that consent judgment, we conclude that California law entitles IXYS to the reciprocal remedy of attorney fees in this case. If IR had prevailed in its assertions that IXYS was violating that consent judgment by aiding and abetting Samsung, IR would have been entitled to assert a claim for attorney fees against IXYS in much the same way as the alleged "coventurer or partner" in *Babcock* or the shareholders and directors who allegedly used the corporation as their alter egos in *Reynolds*.

Int'l Recitifier v. Samsung, 424 F.3d at 1242-43, quoting *Santisas v. Goodin*, 951 P.2d 399, 406-07 (Cal. 1998), Appendix A, 12a-15a.

REASONS FOR DENYING THE PETITION

IR presents two arguments in its petition for certiorari. First, IR claims this Court should provide guidelines to be used by the lower federal courts in certifying questions that present significant unresolved issues. Second, IR argues that this Court should "confirm" that a federal court is not permitted to create new substantive rights under state law.

With regard to the first question, IR presents no evidence that the federal courts need guidance to correctly certify questions of state law. While complaining that the Federal Circuit's standard is "crabbed," IR does not even attempt to explain what that standard is. In fact, the Federal Circuit did not consider or apply any standard in this case because IR never raised the issue on appeal.

Moreover, even if IR is correct in claiming that the Federal and Ninth Circuits have applied different standards for certification, federalism itself requires that different standards be used in different cases because the certification process varies from one state to the next. IR's call for a uniform standard issuing from this Court is simply off-base.

With regard to IR's second question, the Federal Circuit has neither changed nor extended California law by permitting IXYS to collect fees expended in this litigation, which IR asserts arose not out of a contract, but out of Rule 65 of the Federal Rules of Civil Procedure. IR simply refuses to recognize that the obligations it insists Rule 65(d) extended to IXYS were Samsung's *contractual* obligations under the consent judgment. *See Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990) ("[c]onsent decrees have the attributes of both contracts and judicial acts"). The Federal Circuit thus

decided this case consistently with California statutory law and with relevant decisions of the California Supreme Court amplifying the requirement that contractual fee provisions benefit even a nonsignatory such as IXYS, "sued on a contract as if he were a party to it . . ." *Reynolds*, 25 Cal.3d at 128.

I. IR Did Not Properly Raise The Certification Argument In The Court Of Appeals

IR asserts that "[t]he Federal Circuit declined IR's request in this case to adopt the Ninth Circuit's standard for determining when to certify a state-law question to the implicated state's supreme court." Pet. at 13. IR fails to mention that it never requested certification until, after the Federal Circuit had decided the underlying state-law issues in IXYS's favor, IR filed a Combined Petition For Panel Rehearing And Rehearing *En Banc*, which the Federal Circuit denied in a one-sentence order.

By waiting until rehearing to raise certification, IR waived this issue. The Federal Circuit does not consider issues raised for the first time in a petition for rehearing. *Pentax Corp. v. Robinson*, 135 F.3d 760, 762 (Fed. Cir. 1998) ("Just as this court will not address issues raised for the first time on appeal or issues not presented on appeal, we decline to address the government's new theory raised for the first time in its petition for rehearing.")

This Court has also consistently held that a new question cannot be raised for the first time on Supreme Court review when the question was waived in the lower courts. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Brunswick has asserted that federal maritime law governs this case. Because

this argument was not raised below, it is waived."); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("We need not describe the arguments in great detail, because despite the fact the parties have joined issue at least in part on these points, they were neither raised in nor passed upon by the Court of Appeals. In the ordinary course we do not decide questions neither raised nor resolved below."); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2001) (". . . we need not decide here issues not decided below"); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. . . . We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.")

Similarly, this Court should not decide the certification issue because the Federal Circuit chose not to address the argument when IR made it for the first time in its petition for rehearing. As with issues that were waived by the parties in the lower courts, this Court generally does not address issues that were passed over by the lower courts. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below."); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) ("The petition for certiorari also presented the question whether, assuming that respondent Russell's activities as a member of the BOME constitute state action and thus cannot directly form the basis for antitrust liability, evidence of those activities is admissible insofar as it indicates the presence of a nonimmune conspiracy in which Russell and others engaged. A close reading of the opinion below, however, reveals that the Court of Appeals did not address this question. This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. . . . We see no reason to

depart from this practice in the case at bar. Accordingly, we take no position on the evidentiary question raised by petitioner."); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice.")

II. Review Is Not Required To Resolve Conflicting Approaches Between The Federal And Ninth Circuits

A. The Federal Circuit Did Not Consider Certification In This Case; When It Has Done So, It Has Applied Appropriate Standards

IR intimates in its Petition that the Federal Circuit applied a "very narrow" and "crabbed" standard in determining that certification of the underlying state-law issues to the California Supreme Court was not warranted. Pet. at 13. Contrary to IR's assertion, however, the Federal Circuit did not apply *any* standard to determine whether or not certification was appropriate. This is because, as explained above, IR never asked the Federal Circuit to certify the issue until filing its petition for rehearing. While IR suggests that the Federal Circuit's refusal to certify the underlying state-law issues was due to an overly stringent standard for certification, it is much more plausible that the Federal Circuit refused to certify because that Court does not consider issues first raised in a petition for rehearing. *See Pentax Corp. v. Robinson*, 135 F.3d at 762.

Moreover, the only Federal Circuit opinion cited by IR in support of its argument that the Federal Circuit applies an overly strict certification standard does not in fact support IR's position at all. In that case, the Federal Circuit rejected the Government's arguments that under California law, certain uses of railroad rights of way did not go beyond the scope of the Government's easements, and that the Government did not abandon its easements. *Toews v. United States*, 376 F.3d 1371, 1375 (Fed. Cir. 2004). The Federal Circuit denied the Government's request to certify the issue to the California Supreme Court, stating that:

> The California Supreme Court has specifically addressed the question of shifting use in transportation easements, and in thorough opinions, as we have described, explained its rationale. **We are left with no doubt as to the proper application of the state's law to these facts.** The Government's reading of that law is not supported by the California cases.

Id. at 1381 (emphasis added). Moreover, in that case, the Federal Circuit cited two similar cases in which the issue of certification was raised. *Id.* at 1380. In one case, the Federal Circuit did in fact certify the state-law issue to the Maryland Court of Appeals because certain factual issues "left this court in doubt" as to the proper resolution. *Id.* at 1380. In the other case, the Federal Circuit would have certified the issue because of "the unclear state of the common law and statutes of Vermont then in effect . . . ," but could not because there was no mechanism for certification to the Vermont courts at that time. *Id.* at 1380. Thus, the Federal Circuit does certify state-law issues to the relevant state court *when it is appropriate to do so.*

Finally, the Federal Circuit's decision to deny IR's belated request for certification was appropriate given the circuit courts' general reluctance to grant parties' after-the-fact requests for certification. *See, e.g., Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977). In that case, the Court of Appeals for the First Circuit refused the plaintiff's request to certify a state-law issue to the Massachusetts Supreme Judicial Court after the plaintiff's cause of action had been dismissed by the district court. *Id.* at 880. The district court stated,

> We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort. We decline to certify, and hold that the district court correctly dismissed the suit against the University of Massachusetts.

Id. at 880. Here, IR clearly is trying to take a second bite at the cherry after having lost in federal court.

B. There Is No Need To Create A Consistent Standard For Certification In the Circuit Courts

It does not make sense to require the various circuits to apply the same standard for certification. Indeed, it does not make sense to require a single circuit always to apply the same standard for certification. This is because the rules for certification are set forth in the individual court rules for the various states (that have certification procedures), and those rules vary from state to state. While many states have adopted procedures for certification of state-law issues from federal courts, there are variations in the details of those procedures.

For example, while every state with a certification procedure allows its highest court to answer questions from the Supreme Court or from federal courts of appeals, not all states allow certification from federal district courts, or from other state courts. Furthermore, certain states have constitutional limits on the jurisdiction of their courts or on the issuance of advisory opinions that restrict the ability of the courts in those states to answer certified questions. Given these differences, it would be misguided for this Court to announce a unified standard to be used by all federal courts when deciding whether or not to certify an issue to a state court. As the Seventh Circuit has explained,

> [i]t is worth emphasizing that principles of federalism bar us from compelling the Indiana Supreme Court to do anything. It has full discretion to dictate which questions from the federal courts it will answer. And so we may certify questions all day and night, but if the question does not meet the requirements of the Indiana Supreme Court . . . the requests will rightfully fall on deaf ears. . . .

Brown v. Argosy Gaming Co., 384 F.3d 413, 416 (7th Cir. 2004).

III. The Federal Circuit's Determination Is Consistent With California Law

IR's entire certification argument is premised on its assertion that the Federal Circuit's decision that IXYS is entitled to attorney fees under the consent judgment is inconsistent with California law. In particular, IR states that "the failure to certify the issue led the Federal Circuit to create a new rule of California substantive law — a rule every California case addressing the subject suggests or even states to be erroneous and not the policy of California." Pet. at 13. IR is wrong.[3] As explained below, the Federal Circuit's decision is entirely consistent with the leading cases from the California Supreme Court as well as the opinions favorably cited by that court. *See Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124 (1979); *Santisas v.* Goodin, 951 P.2d 399, 406-07 (Cal. 1998); see *also Babcock v. Omansky*, 31 Cal. App.3d 625, 633-34 (1973). Thus, IR could only be seeking certification in an attempt to persuade the California Supreme Court to revisit the underlying state-law issue. This Court has held that:

> It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim. As we have demonstrated, . . . this ordinance is neither ambiguous nor obviously susceptible of a limiting construction. A federal court may not properly ask

3. The very fact acknowledged by IR that there is abundant California case law interpreting § 1717 cuts against certification, which is proper in California only when ". . . there is no controlling precedent." California Rule of Court 29.8(a)(1), (2).

> a state court if it would care in effect to rewrite a statute.

City of Houston v. Hill, 482 U.S. 451, 470-71 (1987). In this case, there is no uncertain question of state law. The California Supreme Court has interpreted California Civil Code § 1717 "to further provide a reciprocal remedy for a non-signatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." *Reynolds Metals*, 25 Cal. 3d at 128.

The California Supreme Court has further specified that § 1717 applies "when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract." *Santisas v. Goodin*, 951 P.2d at 406. Although the facts of these California cases are not identical to those presented here, the "extrapolation does not require much of a leap." *Brown v. Argosy Gaming Co.*, 384 F.3d at 416 n.2 (denying certification). If perfect identity of facts were required in order to avoid certification, certification would be required in nearly every case, since identical facts are exceedingly rare. The Federal Circuit was well within its discretion in deciding this case under California law.

IV. The Federal Circuit Did Not Create New Substantive Rights Under State Law

IR also requests that this court "grant the petition in order to emphasize that the federal courts are without authority to create new state law in conflict with the existing state statutes and precedents." In particular, IR argues that:

> No California case has ever found that a non-party to the relevant contract who had not been sued on a contract theory nevertheless has a contractual right to fees — whether that right arose under Section 1717 or otherwise. The Federal Circuit nevertheless created such a substantive right as a matter of California law, a decision that is at war with at least eight published decisions of the California's [sic] intermediate Courts of Appeal as well as California Supreme Court precedent.

Pet. at 15. IR then characterizes a series of decisions from various California state courts as inconsistent with the Federal Circuit's decision in this case. Pet. at 15-17. IR completely fails to explain, however, *why* in its view the cited opinions are in conflict with the Federal Circuit's opinion. Rather, IR merely provides short summaries of each cited opinion without explaining how each is inconsistent with the Federal Circuit's holding in this case.

Moreover, while IR asserts that its case against IXYS arose not out of a contract, but out of Rule 65 of the Federal Rules of Civil Procedure, it simply refuses to recognize that the obligations it insists Rule 65(d) extended to IXYS were Samsung's *contractual* obligations under the consent judgment. *See Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990) ("[c]onsent decrees have the attributes of both contracts and judicial acts").

This Court should reject IR's request to consider reversing the Federal Circuit's determination that IXYS was entitled to its attorney fees under the consent judgment. This Court has exercised marked restraint in reviewing questions of state law, and even where it is alleged that a circuit court has decided an important question in a way that is in conflict with applicable state law, this Court has rarely reviewed such decisions. *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938). Furthermore, this Court generally has shown great deference to the lower courts' determinations of state law. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1301 n.13 ("We generally accord great deference to the interpretation and application of state law by the courts of appeals."); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Devel. Comm'n*, 461 U.S. 190, 214 (1983) ("Our general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals."); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case.") Given that there is clear guidance from the California Supreme Court on the state-law issue in this case, which the Federal Circuit expressly and thoughtfully followed in making its determination in this case, this Court should defer to the Federal Circuit's decision and decline IR's Petition.

V. Policy Considerations

IR argues that policy considerations dictate creating a uniform standard for certification in the various circuit courts. In particular, IR argues that having non-uniform standards will promote forum shopping by causing plaintiffs to choose between state and federal forums depending upon which has interpreted

a particular state statute or rule more favorably to a particular plaintiff's cause. In reality, however, policy considerations strongly support rejecting IR's present Petition. Allowing IR to take its certification argument any farther will encourage briefing strategies such as IR pursued here, leading to this Court's being presented with raw questions of law, fact and policy *with no underlying decision to review.*

Worse, it will reward Petitioners such as IR with "two bites at the cherry" while taxing the courts with "duplicating judicial effort." *Cantwell*, 551 F.2d at 880. Finally, certification will increase the cost and length of this litigation, which — given the complete absence of critical evidence, as noted by the Federal Circuit — was frivolous at its inception, and has already been costly and lengthy. Allowing IR to argue this issue to this Court, and then possibly to a state court, now that it has lost in federal court, would unfairly require IXYS to incur more fees and endure more delay.

CONCLUSION

For all of the foregoing reasons, IR's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(2)

No. 05-963

IN THE

Supreme Court of the United States

INTERNATIONAL RECTIFIER CORP.,

Petitioner,

v.

SAMSUNG ELECTRONICS CO., LTD. AND
SAMSUNG SEMICONDUCTOR, INC., and IXYS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

INTRODUCTION

After the Federal Circuit created a new substantive right as a matter of California state law, IR petitioned this Court for a writ of certiorari to resolve the conflict among the Circuit Courts of Appeals concerning when to certify such state-law questions to the supreme court of the affected state. Respondent IXYS Corporation barely addresses these concerns, instead focusing its opposition on procedural objections such as its assertion that IR should not now be heard because certification was not requested until IR's petition for rehearing in the Federal Circuit. Those procedural objections are not dispositive, as this Court granted certiorari to consider the certification issue in a procedurally similar case. *Lehman Brothers v. Schein*, 416 U.S. 386, 393, 94 S. Ct. 1741, 1745 (1974) (Rehnquist, J., concurring) (certiorari granted and the certification issue considered on the merits even though certification was first sought on petition for rehearing in the Court of Appeals).

IXYS barely mentions the merits of the certification issue raised in the Petition, devoting but a single paragraph to this issue because, according to IXYS, consistency among the circuits on certification issues "does not make sense." (IXYS Opp. Br., 12.) It does make sense, however, and this Court should issue its Writ of Certiorari to ensure uniformity in the federal courts in deciding when to certify a state-law question for consideration by the supreme court of the implicated state.

ARGUMENT

I. Federal Courts Should Apply A Uniform Standard In Deciding When State-Law Questions Should Be Certified To The Supreme Court Of The Implicated State.

As shown by IR's Petition, the Ninth Circuit – but not the Federal Circuit – follows this Court's precedents requiring deference to state supreme courts in the development of state substantive rights. Ignoring the plethora of Ninth Circuit authority (including all of the leading Ninth Circuit cases that were cited in the Petition), IXYS's sole comment on this point is to suggest that the Federal Circuit has no standard for certification. (IXYS Opp. Br., 10-11.) That may be so, as there is only one reported opinion in which a question was certified by the Federal Circuit – even though the Federal Circuit has nationwide jurisdiction and necessarily is presented with appeals from cases in all 50 states.

Rather than directly address the question raised by the Petition, IXYS seeks to avoid the issue by claiming that it "does not make sense" to seek uniformity among the Circuits on when to certify a state-law question because the states themselves have adopted a variety of procedures (or none at all) for resolving the questions so certified. (IXYS Opp. Br., 12-13.) The only authority IXYS cites for its position is a case in which a Court of Appeals declined to certify a state-law question because the dismissal below was with prejudice and had not been appealed, thus rendering moot any answer that might be given. *Brown v. Argosy Gaming Co.*, 384 F.3d 413, 416 n.2 (7th Cir. 2004).

Our federal system does not require uniformity among the states on questions of state substantive law or of the procedural rules for raising such questions in the state courts.

The Petition makes no such suggestion, and instead argues that this Court's precedents require uniformity in the procedural rules to be applied by *federal* courts when deciding questions of state substantive law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938) (federal courts in diversity must apply the substantive law of the forum state); IR Pet., 7-14.

Indeed, this Court enjoined uniformity of approach in the federal courts precisely because of the variability of state substantive rules. *Erie*, 304 U.S. at 75, 58 S. Ct. at 821. It is inconsistent with this Court's view of appropriate federalism that the Federal Circuit here could create a new rule of California substantive law because the underlying judgment was in a patent-infringement case, while the Ninth Circuit would have certified the identical question had the underlying judgment been in a copyright-infringement case.

Similarly inapposite is IXYS's citation of *Cantwell v. University of Massachusetts*, 551 F.2d 879 (1st Cir. 1977). In that case, the First Circuit properly refused to certify a question in a diversity case where the plaintiff wanted to *change* existing state law: "This is a misconception of the purpose of certification, which is not to permit a party to seek to persuade the state court to change what appears to be present law." *Id.* at 880. In contrast, IR simply wishes the Federal Circuit to consult California *before creating* a new substantive right under California law. To the extent that *Cantwell* can be interpreted as disfavoring certification because it affords parties a chance to consult a state court "after failing to persuade the federal court," then the case exemplifies why guidance from this Court is so urgently needed to establish a uniform approach to such questions. *See also*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1544-63 (1997) (endorsing a broad presumption in favor of certification).

II. The Certification Issue Is Properly Before This Court.

IXYS devotes much of its Opposition Brief complaining that IR should not now be heard because it did not seek certification before the Federal Circuit's opinion announced a new California substantive right. (IXYS Opp. Br., 8-10.) IXYS is wrong. That a request for certification was presented for the first time in a petition for rehearing does not preclude certiorari to consider that issue. *Lehman Brothers*, 416 U.S. at 393, 94 S. Ct. at 1745 (Rehnquist, J., concurring). Moreover, this Court has certified questions even though no request for such had apparently been made in the lower courts. *See Fiore v. White*, 528 U.S. 23, 25, 120 S. Ct. 469, 471 (1999) (finding Pennsylvania Supreme Court's interpretation of state statute was necessary prior to ruling on constitutionality of statute); *Bellotti v. Baird*, 428 U.S. 132, 143, 96 S. Ct. 2857, 2864 n.10 (1976) (certifying question and noting "[i]t is not entirely clear that appellants suggested the same interpretation in the District Court as they suggest here. Nevertheless, the fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue") (internal citation omitted).

IR made its request to the Federal Circuit, and that Court denied it. So long as an issue is raised or resolved in the court below, this Court will hear the issue. Moreover, IR is not now presenting a new theory of the case; the issue of IXYS's entitlement to attorney fees under Section 1717 of the California Civil Code was briefed before both the District Court and the Federal Circuit. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70, 120 S. Ct. 1579, 1586 (2000) (finding no waiver of issue even though it had not been briefed before the Court of Appeals).

IXYS's remaining arguments seek to establish that the Federal Circuit did not actually create new California law. IXYS's arguments in this regard are based on the assertion that its potential liability below was "contractual." IXYS does not discuss, however, the District Court's express finding to the contrary; nor does IXYS discuss the many California authorities that refuse to extend a substantive right to attorney fees to non-contractual parties such as IXYS not sued on a contract theory. (*See* IR Pet., 5-6, 14-18.)

CONCLUSION

This Court has always shown that it is sensitive to the rights of the states to define their own laws. The Federal Circuit's practice of not certifying state-law questions to the supreme court of the implicated state stands in striking contrast to the rule adopted by this Court and in the Ninth and other Circuits for certifying such questions. This aberrational procedure in the Federal Circuit has resulted in the creation by a federal court of a new substantive right under one of California's most frequently litigated statutes. IR therefore respectfully requests that its petition be granted.

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